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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 295 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VIJAYBHAN DULESING GAHARWAL

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 295 of 2003
MR PANKAJ K SONI for Petitioner No. 1
THROUGH JAIL for Petitioner No. 1
MR AJ DESAI APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 22/03/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

#. The appellant-accused-Vijaybhan Dhulesingh Gaharwal has filed this appeal through jail challenging his order of conviction and sentence dated 12.3.2003 passed by the learned Sessions Judge, Navsari in Sessions Case No.48/99 whereby he has convicted the appellant-accused for serious offences like Section 364-A, 302, 507 and 201 of the IPC and sentenced him to suffer life imprisonment for the offence u/S.302 of the IPC and to pay fine of Rs.1,000/= in default to further undergo RI for 4 months. He has also sentenced to suffer life imprisonment and to pay fine of Rs.1,000/= in default to further undergo RI for 4 months for the offence u/S.364-A of the IPC. He has also sentenced him to suffer RI for 2 years and to pay fine of Rs.500/= in default to further undergo RI for 2 months for the offence u/S.201 of the IPC. All the substantive sentences were ordered to run concurrently. The appellant accused has applied for free legal aid in this case as according to him he could not engage private advocate because of his financial condition. Therefore, the office has appointed learned advocate, Mr.Pankaj Soni to defend his case in this appeal. R & P of this case had already been received from the Trial Court.

#. Learned counsel Mr.Soni for the appellant-accused vehemently argued this appeal and submitted that he has a prima facie case for admission of the appeal, therefore, this appeal be admitted by refusing prayer made for bail by the appellant-accused. He also submitted that when the appellant-accused has been convicted for the major offence u/S.302 of the IPC for committing murder and for the offence u/S.364-A of the IPC for kidnapping for ransom and sentenced to suffer life imprisonment, then at least one chance be given to the appellant-accused by admitting this appeal so that he can argue appeal fully at the time of final hearing. It is no doubt true that the appellant-accused has been convicted for the serious offence like murder u/S.302 of the IPC and kidnapping for ransom for offence u/S.364-A of the IPC and sentenced to suffer life imprisonment. But in our considered opinion, it is always not necessary for this court to straightaway admit the appeal when this court is fully convinced that the accused has no case for even admission of the appeal. We were conscious of the fact that the appellant-accused is convicted for the offence u/Ss.302 and 364-A of the IPC and sentenced him to suffer life imprisonment. Therefore, we have heard learned counsel Mr.Soni at the

admission stage fully as R & P of the case was very much with us. Learned counsel Mr.Soni for the appellant-accused had taken us through the reasons assigned by the learned Judge for convicting and sentencing him for the aforesaid offences and also the relevant evidence of the prosecution witnesses.

#. Having carefully gone through the same, we are of the considered opinion that while convicting the appellant-accused for the aforesaid offence, the learned Judge had not committed any error whatsoever, which calls for the interference of this court in this appeal, therefore, the appeal is required to be dismissed in limine.

#. As per the prosecution case, the appellant-accused is none else but the neighbour of the complainant. He is from Uttar Pradesh. Being neighbour they were known to each other very closely. The complainant-Shankar Bhavanbhai Mahda Kokani was residing at Vaghai, which is a tribal area of district Dang in a rented house and working as Peon in state Bank of India. He had two sons and two daughters. Youngest son-Dinesh was studying in Agricultural School. On 12.1.1999, Dinesh returned from school at about 5.00 p.m. After reaching home, he went along with their neighbour-Vijaybhan (present appellant-accused). The complainant had seen accused-Vijaybhan taking away his son Dinesh on the bicycle in the evening on 23.2.2999, but, thereafter, his son did not return till late evening. Therefore, the complainant made inquiry with Rajesh and Yasin, who were classmates of his son-Dinesh at about 10.00 p.m., but Dinesh was not found anywhere. In the night on 12th and 13th January, 1999 he found a ransom note in one brown cover addressed to him demanding Rs.20,000/= from the complainant on 13.1.1999 between 12.00 noon to 5.00 p.m. to be placed at Kiladi's Nani Pool. It was also stated in it that once the money is received then his son-Dinesh will reach home within one hour. He was also warned not to inform about this to the police or anyone else otherwise warned to face the consequences. Initially, for making an arrangement of Rs.20,000/= the complainant tried to approach his brother-in-law at Bharkhadiya, but he could not find him. Thereupon, he left the message with Savitaben, wife of his brother-in-law to send him with money when he returned back at 10 O' clock. One Parsubhai promised him to make arrangement of money, but he could not bring it till 1.30 p.m. Till late evening of 12th his neighbour-accused-Vijaybhan was also not found. Therefore, at last complainant went to the police station and lodged FIR Ex.13 and along with the FIR he

produced ransom note with the cover in which he received the same. After registering the FIR Ex.13 of the complainant, the police arranged trap and asked the complainant to bring one suit case in which bundles of duttas were put in it and the said bag was left at the place as mentioned in his ransom note. After leaving suit case at the particular place, the complainant left the place. However, the police and the panchas were hiding nearby the said place. Within some time the accused came and took away the bag and thereupon immediately the accused was apprehended by the police. He had taken the police to the place where dead body of deceased-Dinesh, who was thrown in the well. Fire Brigade people were called and with their help dead body of the deceased-Dinesh was taken out and sent for postmortem. The accused was arrested by the police and after completing the investigation, charge sheet was filed against him for the aforesaid offences. The case was committed to the court of Sessions by the learned Magistrate for the offences u/S.302, 507, 201 and 364(A) of the IPC.

#. After considering the oral as well as documentary evidence led by the prosecution, the learned Judge came to the conclusion that the prosecution has proved its case beyond reasonable doubt against the accused as chain of circumstantial evidences in this case was complete. The learned Judge was of the opinion that the witnesses may lie, but not the circumstances and when the prosecution had proved all the circumstances and established the chain of circumstances, then there was no option for her but to convict the accused and accordingly she convicted the accused for the said offences.

#. Mr.Soni, learned counsel for the appellant-accused submitted that the conduct of the complainant in not immediately going to the police and lodging FIR was most unnatural and that the complainant had filed complaint on the next day of the incident and in absence of any evidence on the point of the accused and the deceased last seen together, the learned Judge should have given benefit of doubt to the appellant-accused. We find no substance in this submission.

It is no doubt true that on the next date of incident the complainant approached the police and lodged complaint, but in this type of cases, one would not expect a poor father to immediately rush to the police and lodge complaint. In such type of cases, normally the person would like to avoid going to the police immediately and try to inquire at his own level. The

complainant did the same thing in this case by inquiring Yasin and Rajesh, who were friends of deceased-Dinesh and from others till 10 O' clock in the night. When he received the ransom note in the cover, then on the next day first he tried to make arrangement of Rs.20,000/=. For that he went to his brother-in-law, but unfortunately, he was not there. Then he met his friend, who promised him to make arrangement but he also could not help him. At last he approached police and lodged FIR and produced ransom note and the cover. Thus, therefore, on peculiar facts and circumstances of the case, we are of the considered opinion that merely because the complaint was lodged little late then, it cannot be said that the conduct of the complainant was not natural and delay in lodging FIR was fatal.

#. There is also no substance in the allegation made by the appellant that the complainant had lodged the complaint with the help of police. We have no reason to disbelieve the evidence of the complainant when he deposed before the court that he had seen his son Dinesh going away with the accused-Vijaybhan on the bicycle in the evening on 12.1.1999. The accused, being neighbour the complainant would not have even a remote idea in his mind that he would be taking away his son for such purpose. Nothing has come out in his cross-examination on this point. In such type of cases, even if there was no corroboration, then also without any hesitation we would have relied upon his evidence. But, there is one more person i.e. Sandeep Surti PW-29 Ex.20, who had also seen the accused with deceased-Dinesh in the late evening at 8.00 p.m. on 12.1.1999. It was submitted that he was a chance witness. He could not have seen both the accused as well as deceased together. Even if his evidence is to be discarded as chance witnesses, then also, as stated earlier, the accused was seen last together with the deceased by the complainant, father of the deceased-Dinesh.

#. Mr.Soni then submitted that the prosecution has not proved its case of homicidal death of Dinesh because as per the evidence of Dr.Chandraprakash Sharma PW-7 Ex.25 it may be a case of accidental death. There is no substance in this submission. Merely because the doctor had said that death due to accident was also possible, that does not mean that the prosecution has not proved that it was a homicidal death, when this very doctor clearly stated that it was a homicidal death. The conduct of the accused in leaving village Vaghai on 12th by sending ransom note in cover and caught red handed on the next date i.e. on 13th while taking away bag were

more than sufficient to come to the conclusion that it was the accused who committed murder of Dinesh.

#. Mr.Soni then submitted that the evidence of handwriting expert, Ajit, PW-8, Ex.28 is a weak peace of evidence, therefore, it cannot be relied upon for convicting appellant-accused. It is no doubt true that evidence of handwriting expert is weak peace of evidence. If there was only evidence of handwriting expert, then perhaps this court would have entertained the appeal. But, evidence of hand writing expert can always be consider for establishing the chain of circumstantial evidence. Nothing has come out in the cross-examination of handwriting expert, Mr.Ajit Sonalki PW-8 Ex.25. We have also compared the disputed question of handwriting expert with the hand writings of the ransom note at Ex.66 and prima facie, we are also of the opinion that it is of the appellant-accused only.

##. Except the aforesaid submissions, no other submission was made, therefore, this appeal was required to be dismissed summarily at the admission stage as in our considered opinion, the prosecution has fully established the following chain of circumstantial evidences, which are as under:-

(i) On 12.1.1999 Dinesh had gone to school in the morning and returned from school at 5.00 p.m. and after leaving his school bag he left the house on the bicycle of the accused, which was seen by his father-complainant.

(ii) The accused was none else but neighbour, therefore, neither complainant nor his son deceased-Dinesh might have any doubt in their mind when the accused took away Dinesh on his bicycle. As per the evidence of Mr.Surti he had seen the accused and deceased-Dinesh at 8.00 p.m. and thereafter nobody had seen them and on the next day dead body of Dinesh was recovered from the well at the instance of the accused.

(iii) As per the ransom note, on 13.1.1999 at about 3.30 p.m. at Kiladi's bridge, the accused came to collect the money bag and caught red handed by the police. Expect accused, nobody else was knowing about the place where the complainant had to come with money bag. He was asked to come between 12.00 noon to 5.00 p.m. on 13.1.1999. After being apprehended he had taken the police where he had thrown the deceased-Dinesh in well.

(iv) Evidence of handwriting expert, Mr.Ajit Ex.28 has proved beyond reasonable doubt that ransom note Ex.66 found in cover Ex.67 were having handwriting of appellant-accused from whose house two note books were recovered.

(v) From the evidence of Dr.Sharma prosecution has clearly proved that death of Dinesh was due to asphyxia.

(vi) Dead body of Dinesh was taken out from the well by the fire brigade personnel, who have clearly supported the prosecution case and nothing has come out in the cross-examination.

##. It is no doubt true that in the instant case, there is no eye witness to the incident, we may only state that witness my lie, but not the circumstances. In the instant case, we have narrated the aforesaid circumstances, which complete the chain against the appellant-accused, which leads to the only conclusion that it was none else but the appellant-accused alone, who had kidnapped minor boy-deceased-Dinesh, aged 13 for ransom and then committed his murder by throwing him in well. Therefore, he has been rightly convicted for the offences u/Ss.364-A and 302 of the IPC and sentenced to suffer life imprisonment.

In view of the above discussion, this appeal fails and is hereby summarily dismissed.

(B.J.Shethna, J.)

(J.R.Vora, J.)

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